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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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09/924,298

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Vincent Bryan

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HAYNES AND BOONE, LLP

901 Main Street

Suite 3100

Dallas, TX 75202

EXAMINER

PHILOGENE, PEDRO

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

03/27/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

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|--|--|---|--|
| <p align="center"><b>Advisory Action</b><br/><b>Before the Filing of an Appeal Brief</b></p> | <p><b>Application No.</b><br/>09/924,298</p> | <p><b>Applicant(s)</b><br/>BRYAN ET AL.</p> |  |
|  | <p><b>Examiner</b><br/>Pedro Philogene</p>   | <p><b>Art Unit</b><br/>3733</p>             |  |

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 14 March 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: 43,44,66,67,70,91,92 and 114-119.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 310-17,23-40,56-61,71,74-76,86-90.  
Claim(s) withdrawn from consideration: 93-96,101-103,106-110,112,113 and 121.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/Pedro Philogene/  
Primary Examiner, Art Unit 3733

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's argument regarding claims 56-61 is not found to be persuasive. Applicant stated that Buttner-janz did not teach of an upper shoulder that is recessed into a portion of the perimeter of the upper contact surface and a lower shoulder that is recessed into a portion of the perimeter of the lower contact surface. The examiner begs to differ, as shown in Fig. 2, and as set forth in column 3, lines 59 of Buttner-Janz it is shown that the upper and lower shoulders contact the perimeter (7) or the outer limit (6) of the central body. Contrary to the dictionary definitions of perimeter presented in applicant's argument, applicant is not claiming an inner nor an outer perimeter, applicant is only claiming that the shoulders contact a perimeter of the central body. The shoulders of the reference contact the central body, therefore, meet the claims.

As to the argument regarding claims 74-76, applicant stated that the opening 21 in the cover plate 3" of the Fuhrmann patent "serves to fill the interior with viscoelastic material--- or, together with a similar opening, as ventilation." The opening is not for the "introduction of a lubricant into the implant between the central body and opposing shells". Again, the examiner begs to differ. The opening in the device of Fuhrmann is fully capable of performing this function since applicant is not positively claiming this limitation. Applicant stated that "applicant is not only claiming that the opening is capable of introducing a lubricant," but rather applicant is claiming that the opening facilitates "the introduction of a lubricant into the implant between the central body and the opposing shells after the implant has been assembled". It is clear that the opening of Fuhrmann is fully capable of introducing a lubricant or fully capable of facilitating the introduction of a lubricant. As to claims 3, 10-15, the device of Ray et al clearly discloses a device that has a jacket (24) forming a cavity to receive a core (22). the core (22) increases in size as more fluids are imbibed, therefore, the core absorbs liquid and the liquid occupies the same space as the liquid. , the fluid contains beneficial nutrients to restore disc space. Therefore, contrary to applicant's argument, the device of Ray et al teaches of a lubricant that occupies the same space as the core.

As to claims 16, 17, see the response to claims 74, 76 above. As to claims 23-40, 86, 87, 90, 88, 89, applicant stated that there is no reason to combine the references. In this case, given the problem to be solved, under the correct analysis, any need or problem known in the field and addressed by the patents can provide a reason for combining the elements in the manner claimed. It is common sense that familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill in the art often will be able to fit the teachings of multiple patents together like a piece of a puzzle.

The amendment to claims 43, 44, 66, 67, 70 overcomes the final rejections.